No. 486

In the Supreme Court of the United States

OCTOBER TERM, 1950

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 486

PANHANDLE EASTERN PIPE LINE COMPANY,
APPELLANT

v.

MICHIGAN PUBLIC SERVICE COMMISSION AND MICHIGAN CONSOLIDATED GAS COMPANY

APPEAL FROM THE SUPREME COURT OF THE STATE OF MICHIGAN

MEMORANDUM FOR THE FEDERAL POWER COMMISSION AS AMICUS CURIAE

Although appellant has challenged the Michigan order primarily on the ground that it contravenes the Commerce Clause, a proper disposition of the case, as we see it, turns upon the interpretation of the federal Natural Gas Act, 52 Stat. 821, 15 U. S. C. § 717. This memorandum is filed in the belief that a brief expression of the views of the Federal Power Commission will be of aid to the Court.

1. There can be no question that the gas which Panhandle proposes to sell to the Ford Motor Company is in interstate commerce. If it were not for the Natural Gas Act, a difficult constitutional question would arise as to whether a state, for the purpose of protecting a local gas company against interstate competition, may prohibit a natural-gas company from selling gas in interstate commerce directly to industrial consumers. *Cf. Hood & Sons* v. *Du Mond*, 336 U. S. 525. But we think that the constitutional issue need not be decided independently of the Natural Gas Act in this case any more than in *Panhandle Eastern Pipe Line Co.* v. *Public Service Commission of Indiana*, 332 U. S. 507, 523-524.

2. In the Natural Gas Act, Congress undertook to regulate those aspects of the natural gas industry as to which, in its view, federal control was necessary. Congress there paid particular heed to the doctrine of this Court that states could not reach certain interstate transactions, thus leaving an area where states could not regulate and which the Federal Government had not regulated. Congress intended to create a comprehensive regulatory scheme, complementary in operation, leaving subject to continued state regulation those aspects not reached by the Federal Act. See *Panhandle-Indiana* case, *supra*, at 520-521. This manifestation of congressional intention makes it unnecessary for the Court to decide the case on the basis of the Commerce Clause alone.

The question here relates to the authority to require certificates of public convenience and necessity for direct sales to industrial consumers; this, in substance, is the authority to prohibit such sales.

The federal statute requires that natural gas companies obtain certificates for the *transportation* of natural gas in interstate commerce to industrial consumers; to allow the states to require certificates as to the sale to such consumers might frustrate the finding of public convenience and necessity upon the basis of which a federal transportation certificate was granted. This possibility of conflict presents, in our opinion, the fundamental issue raised in this case.

In addition to denying the authority of Michigan to require a certificate of necessity for sales to industrial consumers, appellant has asserted in proceedings before the Federal Power Commission that the latter also has no authority to require a federal certificate for the extension of its transportation facilities to the Ford Motor Company.[1] Appellant's brief in this case (pp. 7, 23), which seems to concede the Federal Commission's authority over such transportation, may manifest an abandonment of that position. In any event, it is clear that adoption of the contention advanced before the Federal Power Commission as to its lack of authority to prohibit transportation to industrial consumers and of the argument made here that Michigan has no authority to prohibit such sales would create a hiatus between the powers of the Federal and State Commissions which would enable appellant to furnish gas to industrial consumers irrespective of the disapproval of both agencies. Congress certainly intended no such result, as the *Panhandle-Indiana* case holds. 332 U.S. at 520-521.

---

[1] *City of Detroit* v. *Panhandle Eastern Pipe Line Co.*, 5 F.P.C. 43, 50 (1946); *Re Panhandle Eastern Pipe Line Company*, Docket No. G-1417, presently pending.

3. The *Panhandle-Indiana* case held that Congress deliberately left with the states and not with the Federal Commission the authority to regulate rates and services in interstate sales to industrial consumers. The Court did not indicate that the power of the states to regulate such sales included the power to prohibit them, nor was that issue before it. Indeed, the Court pointed out that "State power to regulate interstate commerce * * * is not the power to destroy it, unless Congress has expressly so provided." 332 U.S. at 522-523. The Court noted (332 U.S. at 523) that the "matter of interrupting service is one largely related * * * to transportation and thus within the jurisdiction of the Federal Power Commission to control, * * *"[2]

Although the Federal Commission does not have authority under the statute to regulate direct sales to industrial consumers, it has been given authority over interstate "transportation." Section 7(c) (15 U.S.C. § 717f(c)) of the federal statute provides no natural-gas company shall:

> engage in the transportation * * * of natural gas, subject to the jurisdiction of the Commission, or undertake the construction or extension of any facilities therefor, or acquire or operate any such facilities or extensions thereof, unless there is in force with respect to such natural-gas company a certificate of public convenience and necessity issued by the

[2] The Court referred to the Commission's grant of permission to Panhandle to extend its facilities to serve an industrial consumer "without prejudice to the authority of the Indiana Commission in the exercise of any jurisdiction which it may have over the sale or service proposed to be rendered * * *." Clauses of this type have only been included in a few certificates issued by the Federal Commission, and in none since 1946. See note 4, *infra*.

Commission authorizing such acts or operations * * *.

Inasmuch as the transportation from an interstate pipe line for sale directly to a consumer is transportation in interstate commerce, subject to the jurisdiction of the Commission as defined in Section 1(b) (15 U.S.C. §717(b)),[3] Section 7(c) requires companies seeking to establish connections between such lines and consumers to obtain certificates from the Federal Commission for the construction and operation of the necessary extensions of their lines.

The Federal Commission has, in many decisions, held that it possessed certificate authority over transportation for direct sale to consumers.[4] One

---

[3] Section 1(b) of the Natural Gas Act reads as follows:

(b) The provisions of this Act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

[4] See *e.g.*, *Louisiana-Nevada Transit Company*, 2 F.P.C. 546 (1939), affirmed, *Arkansas Louisiana Gas Co.* v. *Federal Power Commission*, 113 F. 2d 281 (1940); *Panhandle Eastern Pipe Line Company*, 3 F.P.C. 1005 (1943); *Colorado Interstate Gas Company*, 3 F.P.C. 1021 (1943); *Panhandle Eastern Pipe Line Company*, 3 F.P.C. 1088 (1943); *Northern Natural Gas Company*, 4 F.P.C. 415 (1943); *El Paso Natural Gas Company*, 4 F.P.C. 878 (1945); *El Paso Natural Gas Company*, 4 F.P.C. 881 (1945); *Greenfield Gas Company, Inc., and Greenfield Gas Company, Inc.* v. *Panhandle Eastern Pipe Line Company; Panhandle Eastern Pipe Line Company; Eastern Indiana Gas Company*, 4 F.P.C. 1010 (1945); *Northern Natural Gas Co.*, 4 F.P.C. 1075 (1945); *City of Detroit, et al.* v. *Panhandle Eastern Pipe Line Company, et al.*, 5 F.P.C. 43, 50 (1946); *Natural Gas Pipeline Company of*

of the leading cases, decided after the Michigan Commission's decision in this case, involved an unsuccessful attempt by Panhandle to obtain the consent of the Federal Commission for construction and operation of facilities required to make

---

America, 5 F.P.C. 519 (1946); *Cities Service Gas Company*, 5 F.P.C. 571 (1946); *Arkansas Louisiana Gas Company*, 5 F.P.C. 580 (1946); *Arkansas Louisiana Gas Company*, 5 F.P.C. 581 (1946); *Arkansas Louisiana Gas Company*, 5 F.P.C. 734 (1946); *Arkansas Louisiana Gas Company*, 5 F.P.C. 813 (1946); *Arkansas Louisiana Gas Company*, 5 F.P.C. 873 (1946); *Arkansas Louisiana Gas Company*, 5 F.P.C. 876 (1946); *Natural Gas Pipeline Company of America*, 5 F.P.C. 934 (1946); *Arkansas Louisiana Gas Co.*, 6 F.P.C. 300 (1947); *Kansas-Nebraska Natural Gas Co., Inc.*, 6 F.P.C. 368 (1947); *Consolidated Gas Utilities Corp.*, 6 F.P.C. 454 (1947); *Gas Transport, Inc.*, 6 F.P.C. 461 (1947); *Northern Natural Gas Co.*, 6 F.P.C. 641 (1947); *El Paso Natural Gas Co.*, 6 F.P.C. 670 (1947); *Panhandle Eastern Pipe Line Co.*, 6 F.P.C. 688 (1947); *Southern Natural Gas Co.*, 7 F.P.C. 636 (1948); *Southern Natural Gas Co.*, 7 F.P.C. 1006 (1948); *Northern Natural Gas Co.*, 7 F.P.C. 1068 (1948); *Panhandle Eastern Pipe Line Co.*, 7 F.P.C. 1121 (1948); *Re East Tennessee Natural Gas Company*, Docket No. G-1065 (May 3, 1949); *Re Louisiana-Nevada Transit Company*, Docket No. G-1184 (June 1, 1949); *Re Alabama-Tennessee Natural Gas Company*, Docket No. G-1271 (November 22, 1949); *Re Panhandle Eastern Pipe Line Company*, Docket No. G-1322 (March 9, 1950); *Re Northern Natural Gas Company*, Docket No. G-1331 (May 2, 1950); *Re Cities Service Gas Company*, Docket No. G-1355 (June 6, 1950); *Re Texas Gas Transmission Corporation*, Docket No. G-1341 (July 3, 1950); *Re Southern Natural Gas Company*, Docket No. G-1404 (July 26, 1950); *Re Acme Natural Gas Company*, Docket No. G-1352 (July 27, 1950); *Re Transcontinental Gas Pipe Line Corporation*, Docket No. G-1512 (December 12, 1950); *Re Transcontinental Gas Pipe Line Corporation*, Docket No. G-1539 (December 14, 1950); *Re Texas Gas Transmission Corporation*, Docket No. G-1471 (January 19, 1951); *Re Montana-Dakota Utilities Co.*, Docket No. G-1529 (January 24, 1951); *Re Montana-Dakota Utilities Co.*, Docket No. G-1530 (January 24, 1951); *Re Texas Gas Transmission Corporation*, Docket No. G-1489 (February 13, 1951); *Re Consolidated Gas Utilities Corporation*, Docket No. G-1531 (February 20, 1951); *Re Southern Natural Gas Company*, Docket No. G-1541 (March 6, 1951).

the proposed deliveries of gas to the Ford Motor Company in Michigan. *City of Detroit, et al.* v. *Panhandle Eastern Pipe Line Company, et al.*, 5 F.P.C. 43, 50. The authority of the Federal Commission over such interstate transportation to industrial consumers was challenged by Panhandle both in that case and in the new application presently pending before the Commission. Nevertheless, since the terms of the statute plainly give the Commission such authority, since the Court's opinion in the *Panhandle-Indiana* case seems to recognize it (332 U.S. at 523), and since Panhandle's present brief seems to concede it, we shall assume in the remainder of this discussion that the Commission is acting lawfully in requiring a federal certificate for the extension of transportation facilities.

4. Michigan is not attempting to require Panhandle to obtain a certificate for the transportation of gas to the Ford Motor Company, but for the right to sell such gas to the company. It is, of course, true that a state certificate authorizing an interstate sale to an industrial consumer would be meaningless if the Federal Commission can deny a certificate for the necessary transportation facility, and *vice versa*. The question arises, therefore, as to whether federal and state agencies have concurrent but possibly conflicting certificate jurisdiction over different aspects of the relationship between a gas company and industrial consumers or whether the certificate authority of either the federal or state regulatory body is exclusive. We think that the federal authority over transportation cannot be subordinate to the state's authority over the sale in the sense that the grant-

ing of a state certificate authorizing the sale can override the denial of a transportation certificate by the Federal Commission. Correspondingly, if the Federal Commission determined, as provided for in Section 7(e) of the Natural Gas Act, that the public convenience and necessity require the transportation of gas in interstate commerce for direct sale to an industrial consumer, it would seem that the state could not nullify such federal action through denial of a certificate for the sale.

Such a factual conflict has not arisen, however, and may never arise. In the situation involved here, the Federal Commission has once denied Panhandle's application for permission to extend its lines to make the sale to the Ford Company (see p. 3, *supra*); a new application is now pending.[5] Whether the Federal Commission will grant the application at all is entirely problematical. Nor has the Michigan Commission yet decided whether to grant or deny a certificate for the sale. Hence, the view may be taken that the federal and state agencies are thus far acting in accordance with "the scheme * * * of cooperative action" which this Court has held the statute contemplates (332 U.S. at 520).

But if the view be taken that a conflict does arise from the very assertion by the Michigan Commission of power to prohibit a natural-gas company from selling gas in interstate commerce directly to an industrial consumer, thus colliding with the Federal Commission's certificate authority over

[5] Re *Panhandle Eastern Pipe Line Company*, Docket No. G-1417, now being heard by a Trial Examiner. Panhandle has requested the Commission either to disclaim jurisdiction or to issue a certificate.

interstate transportation, we suggest that, whatever the scope of the certificate authority of the State Commission, it cannot be so employed as to nullify or foreclose, even in part, exercise of the Federal Commission's certificate authority which the Court has described as "plenary." *Illinois Natural Gas Co.* v. *Central Illinois Public Service Co.*, 314 U.S. 498, 510.

PHILIP B. PERLMAN,
Solicitor General.
ROBERT L. STERN,
Special Assistant to the Attorney General.

BRADFORD ROSS,
General Counsel.
WILLIAM S. TARVER,
Assistant General Counsel.
BERNARD A. FOSTER, JR.,
Special Counsel.
Federal Power Commission.

APRIL 1951.

☆ U. S. GOVERNMENT PRINTING OFFICE 1951 940991 733